UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

COLEMAN J. FENTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 03-281-P-H
	)	
SERGEANT PELLITIER, et al.,	)	
	)	
Defendants.	)	

RECOMMENDED DECISION

Plaintiff Coleman J. Fenton is currently incarcerated at the United States Penitentiary in Beaumont, Texas. Fenton has filed a five count complaint against officers affiliated with the Maine Drug Enforcement Agency (MDEA), the federal Drug Enforcement Agency (DEA), and the South Portland police department. (Docket No. 1.) Essentially, Fenton complains that these officers violated his constitutional rights during and after the execution of a search warrant at his residence on December 7, 2001. The subject search predated and related to the conviction for which Fenton is currently serving time. Fenton complains that his computer hard drive was searched without probable cause and without a warrant and that various items of personal property were seized by the police and never returned to him. Fenton also alleges that his truck's glove compartment was destroyed during the search and the police did not have a search warrant to search the vehicle. Fenton alliteratively describes the conduct as the "pillaging and plundering of plaintiff's personal property by each of the 25 participants." (Docket

No. 1, Count I.) I recommend that the court dismiss Fenton's complaint pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A.

Procedural Background

Fenton filed his complaint on December 8, 2003. On June 28, 2004, Frank Clark, a South Portland police officer, filed an answer to the complaint. On July 12, 2004, I granted Fenton's request that the U.S. Marshal make service on other defendants in this in forma pauperis case. On August 16, 2004, federal agents Boyle and Buchanon, represented by an assistant United States attorney, filed a Motion for Rule 11 Sanctions seeking dismissal of the complaint. (Docket No. 21.) Attached to the Rule 11 motion are copies of federal search warrants that authorized the searches that are the subjects of Fenton's complaint.

On August 20, 2004, the clerk sent the Marshal's service the appropriate documents for service on Pelletier, Chin and Dubois. On August 24, the clerk sent the Marshal's service the appropriate documents for service on Decourcey and Regan. It does not appear that service documents were ever prepared vis-à-vis Officer Paxel. On September 13, 2004, the United States Marshal filed a return indicating that service had been made on Regan and Pelletier.

On September 16, 2004, Fenton filed a document (Docket No. 26) that I construed as a request for this court to order the FBI to conduct an investigation of his charges and a notice that he was voluntarily dismissing his lawsuit as to those defendants who had not yet answered or been served. I denied the request for an FBI investigation. In fact, since the document stated that he intended to "back off" his entire lawsuit, I interpreted it as a motion to dismiss as to those defendants who had already filed some

type of responsive pleading. I thus directed those defendants to respond to the motion. They have done so, with Clark indicating he has no objection to the dismissal and with Boyle and Buchanon seeking a dismissal with prejudice in order to prevent any reinstitution of this lawsuit.

On September 27, 2004, Fenton filed a motion for reconsideration of my prior order regarding the FBI investigation. (Docket No. 31.) I now **GRANT** that request for reconsideration. Fenton explains in his motion that he did not intend his earlier motion to be a voluntary dismissal of his case nor did he intend it as a request that the court investigate the charges he had made in the lawsuit. Rather, Fenton indicates that he wanted the court's guidance and "investigation" to center on the issue of why service had not been accomplished on the remaining defendants. However, there was no need for any investigation of those issues. The docket plainly indicates that Regan and Pelletier's answers were not due until November 2 and 8 respectively and that Chin, Decourcey, and Dubois had not yet been served when Fenton filed notice of his intention to "back off" his lawsuit. Nevertheless, for purposes of this recommended decision I will consider that the lawsuit is reinstated as to all of the defendants.

Boyle and Buchanon have filed a Motion for Sanctions under Rule 11, requesting dismissal of the action as to all defendants as an appropriate sanction for Fenton's untrue representations concerning the illegality of the search. (Docket No. 21.) In support of that motion they have filed two documents, a copy of a search warrant for a house and a copy of a search warrant for a vehicle. Since these documents are central to Fenton's complaint, I have taken judicial notice of them and have considered them in fashioning this recommended decision. I now recommend the court **DENY** the motion for sanctions

under Rule 11, but I do recommend that the court dismiss, sua sponte, Fenton's complaint.

Discussion

Because Fenton is proceeding in forma pauperis, his complaint is subject to sua sponte dismissal under 28 U.S.C. § 1915(e)(2). Furthermore, because Fenton is a prisoner seeking redress from officers or employees of governmental entities, his complaint is also subject to preliminary screening pursuant to 28 U.S.C. § 1915A regardless of whether he proceeds in forma pauperis. Under either statute, Fenton's claims are subject to sua sponte dismissal if they are frivolous or otherwise fail to state a claim for which relief may be granted. Id., § 1915(e)(2)(B), § 1915A(b)(1). Having said this, pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

At the core of Fenton's complaint is a Fourth Amendment claim premised on the false factual assertion that the defendants did not have a warrant to search his home and vehicle. The record plainly establishes that the defendants did possess a warrant, issued by a federal magistrate judge, and that the warrant authorized the officers to search both the premises and any vehicles on the premises and to seize, among other things, Fenton's computer (the officer's made a "safeback" copy of the hard drive), papers, files, photographs and scale. In addition, the switchblade was appropriately seized pursuant to 15 M.R.S.A. § 5821(3-A), which authorizes law enforcement officers to seize dangerous

weapons found during a lawful search for scheduled drugs in which scheduled drugs are found, as they were here. Because the search and seizure at issue in this case was supported by a warrant, Fenton's allegations to the contrary notwithstanding, I recommend that the court dismiss, sua sponte, all of Fenton's claims premised on the Fourth Amendment prohibition against unreasonable searches and seizures.

The remaining loose threads in Fenton's complaint concern his allegations that the defendants maliciously "destroyed" his computer and the dashboard of his vehicle, and that they failed to return certain seized property, including a file box, a locker, various paper files, three briefcases, some lock boxes with keys, a carved balsawood cat, some Viagra pills, two "stories" and some personal photographs. (Count V.) Contrary to Fenton's allegations, this aspect of Fenton's complaint does not concern First Amendment privacy rights because the warrant authorized the subject invasion into Fenton's privacy. The only constitutional concern suggested by these allegations is whether Fenton was deprived of personal property without due process of law under either the Fifth Amendment or the Fourteenth Amendment. However, the Due Process Clause does not give rise to a cause of action for property deprivation arising from random, unauthorized acts by government actors, as Fenton has alleged here, where meaningful post-deprivation relief is otherwise available. See Hudson v. Palmer, 468 U.S. 517, 533-535 (1984) ("[There is no] violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available. For intentional . . . deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide suitable postdeprivation remedies."). See also Daniels v. Williams, 474 U.S. 327, 329-31 (1986)

(holding that mere lack of due care cannot support a due process claim); Parratt v. Taylor, 451 U.S. 527 (1981) (involving allegations of negligent loss of prisoner's personal property); Lowe v. Scott, 959 F.2d 323, 340 (1st Cir. 1992) ("Parratt and Hudson teach that if a state provides adequate postdeprivation remedies--either by statute or through the common-law tort remedies available in its courts--no claim of a violation of procedural due process can be brought under § 1983 against the state officials whose random and unauthorized conduct occasioned the deprivation.").

Vis-à-vis the state officers, Maine tort law affords a meaningful post-deprivation remedy. See MacKerron v. Madura, 474 A.2d 166, 167 (Me. 1984) ("The Maine Tort Claims Act confers no immunity on governmental employees for intentional torts."); Giguere v. Morrisette, 142 Me. 95, 98-99, 48 A.2d 257, 259 (1946) (describing common law "trover" action). Similarly, assuming that a due process claim can be maintained against the federal agents in accordance with Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971), see Schweiker v. Chilicky, 487 U.S. 412, 421-22 (1988), an action for trover/conversion under Maine tort law, processed through the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq., provides a meaningful post-deprivation remedy. See Friedman v. Young, 702 F. Supp. 433, 437 (S.D.N.Y. 1988) ("The Federal Tort Claims Act . . . provides for an action against the United States in tort for property taken or lost by federal employees acting within the scope of their employment.").[1]

[1] In addition to the FTCA, Rule 41(g) of the Federal Rules of Criminal Procedure afforded, and may yet afford, some measure of relief to Fenton, albeit not monetary damages, assuming some of the property has not been destroyed or otherwise disposed of. See United States v. Jones, 225 F.3d 468, 470 (1st Cir. 2001) ("We therefore agree with the Third and Fifth Circuits that courts lack jurisdiction to award damages under Rule 41(e)."). Note that Rule 41 was amended in 2002 so that former subsection e is now subsection g. See Fed. R. Crim. P. 41.

Conclusion

For the reasons stated herein, I **GRANT** Fenton's motion for reconsideration of his prior motion for an investigation (Docket No. 31), recommend the court **DENY** the federal agents' motion for Rule 11 sanctions (Docket No. 21) and **RECOMMEND** that the court **DISMISS** Fenton's complaint, sua sponte, pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A, because it fails to state a claim under § 1983 or Bivens.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated October 5, 2004

FENTON v. PELLETIER et al
Assigned to: JUDGE D. BROCK HORNBY
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 12/08/03
Jury Demand: Defendant
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

COLEMAN J FENTON represented by **COLEMAN J FENTON**
REG NO 04196-036

USP BEAUMONT
UNIT E-B
PO BOX 26030
BEAUMONT, TX 77720
PRO SE

V.

Defendant

BUCHANON, ***Agent***

represented by **EVAN J. ROTH**
OFFICE OF THE U.S. ATTORNEY
DISTRICT OF MAINE
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257
Email: evan.roth@usdoj.gov
ATTORNEY TO BE NOTICED

BOYLE, ***Agent***

represented by **EVAN J. ROTH**
(See above for address)
ATTORNEY TO BE NOTICED

FRANK CLARK

represented by **EDWARD R. BENJAMIN, JR.**
THOMPSON & BOWIE
3 CANAL PLAZA
P.O. BOX 4630
PORTLAND, ME 4112
774-2500
Email: ebenjamin@thompsonbowie.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

DOES, ***whose names are presently unknown to plaintiff at this time***